

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs November 5, 2007

**IN THE MATTER OF S. T. T.**

**Appeal from the Juvenile Court for DeKalb County**  
**No. 1165 CJ 05     Bratten H. Cook II, Judge**

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**No. M2007-01609-COA-R3-PT - Filed January 17, 2008**

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Father appeals the termination of his parental rights to his biological child, S. T. T. The trial court terminated Father's parental rights on the grounds of abandonment by willfully failing to support, substantial non-compliance with permanency plan, and failure to establish parentage. The trial court also found that the termination of Father's parental rights was in the child's best interest. We affirm the trial court's termination of parental rights based upon Father's abandonment by willfully failing to support and the fact that termination of his parental rights is in the child's best interest.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed**

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and D. MICHAEL SWINEY, J., joined.

J. Hilton Conger, Smithville, Tennessee, for the appellant, R. M. S.

Robert E. Cooper, Jr., Attorney General and Reporter, and Lauren S. Lamberth, Assistant Attorney General, for the appellee, State of Tennessee, Department of Children's Services.

**OPINION**

S. T. T. (the child) was born on March 11, 2005. No one was identified as the father on her birth certificate. The child originally resided with her mother until April 27, 2005, when the Department of Children's Services filed a petition for temporary custody alleging she was dependent and neglected because she was underfed and not receiving proper care.

The fact that makes this case much more complex than necessary is that the child's mother not only did not list anyone as the father on the birth certificate, she also informed the Department that the father was Louis Chavez, the man she then lived with. Moreover, Mr. Chavez did not dispute the mother's assertion that he was the child's father. A few weeks later, with the agreement of the mother, Mr. Chavez and the Department, the trial court entered an agreed order finding the child to be dependent and neglected. The order allowed the mother and Mr. Chavez to retain physical custody of the child as long as they complied with a Protective Supervision Plan. The mother and Mr. Chavez, however, soon failed to comply with the plan, and physical custody of the

child was transferred to the Department on May 15, 2005, when she was two (2) months old. The child was immediately placed with foster parents and has remained with the same foster parents ever since.

On June 2, 2005, the Department drafted the first permanency plan for the child. That plan, however, listed Mr. Chavez as the father. Seven months later, in January of 2006, the Department learned that Mr. Chavez was not the child's biological father. Upon further inquiry, the Department was informed by the mother that she had been residing with another man, R.M.S., at the time of conception and that the mother believed R.M.S. was the father. The Department therefore attempted to locate R.M.S. After the initial attempts to reach R.M.S. proved unsuccessful, R.M.S. learned of the Department's efforts to contact him and he voluntarily contacted the Department in February of 2006. During their first discussions, R.M.S. informed the Department that he was interested in pursuing his rights to the child. At the Department's request, on February 15, 2006, the juvenile court ordered R.M.S. to undergo DNA testing. The test results, released on March 28, 2006, conclusively established that R.M.S. was the child's biological father. R.M.S. is identified as "Father" hereinafter.

With Mr. Chavez now out of the picture, it was necessary to amend the permanency plan to properly identify and include Father as a parent of the child. Thus, on May 2, 2006, the Department and Father entered into a revised permanency plan. The plan required Father to: (1) demonstrate the ability to establish and maintain a relationship with his child by visiting regularly; (2) consistently use good parenting skills; (3) respond to the physical needs of his child positively and with affection and nurturance; (4) identify an appropriate supervision plan for his child; (5) attend anger management counseling until successfully discharged; (6) sign releases of information so that professionals can share progress and concerns; (7) maintain adequate housing and legal means of income appropriate for himself and his child; (8) be up-to-date on paying child support for his child while not in his care; (9) gain and maintain medical insurance for his child; (10) maintain contact with DCS and keep DCS informed of his location. The plan listed an expected achievement date of June 2, 2007.

The plan that Father signed expressly stated that he had participated in the development of the plan, that the plan had been discussed with him, that he agreed with the plan, and that he had received a copy. The documentation Father signed also indicated that he had received the Criteria & Procedures for Termination of Parental Rights which the Department caseworker had explained to him.

Although the plan had an expected achievement date of June 2, 2007, the Department became dissatisfied with the progress of the case and unilaterally decided to abandon the goal of reunification and to pursue adoption, instead, as the only goal.<sup>1</sup> Pursuant to this decision, the Department filed its petition to terminate the parental rights of both parents on January 17, 2007. The grounds asserted against Father included abandonment by failure to support, abandonment by failure to establish a

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<sup>1</sup>The Department obtained legal custody of the child on August 9, 2006. In September of 2006, the juvenile court adjudicated the child dependent and neglected.

suitable home, substantial non-compliance with the permanency plan, persistent conditions, risk of substantial harm to the psychological welfare of the child, and failure to establish parentage. The trial took place on April 17, 2007, and May 23, 2007. By order entered on June 19, 2007, the parental rights of both parents were terminated. Father timely filed this appeal. The child's mother has not appealed the termination of her parental rights.

#### STANDARD OF REVIEW

Parents have a fundamental right to the care, custody and control of their children. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Hawk v. Hawk*, 855 S.W.2d 573, 577 (Tenn. 1993). This right is superior to the claims of other persons and the government, yet it is not absolute. *In re S.L.A.*, 223 S.W.3d 295, 299 (Tenn. Ct. App. 2006).

The party seeking to terminate parental rights must prove two elements. That party, the petitioner, has the burden of proving that there exists a statutory ground for termination. Tenn. Code Ann. § 36-1-113(c)(1) (2005); *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002). Furthermore, the petitioner must prove that termination of parental rights is in the child's best interest. Tenn. Code Ann. § 36-1-113(c)(2) (2005); *In re F.R.R., III*, 193 S.W.3d 528, 530 (Tenn. 2006). See *In re A.W.*, 114 S.W.3d 541, 544 (Tenn. Ct. App. 2003); *In re C.W.W.*, 37 S.W.3d 467, 475-76 (Tenn. Ct. App. 2000) (holding a court may terminate a parent's parental rights if it finds by clear and convincing evidence that one of the statutory grounds for termination of parental rights has been established and that the termination of such rights is in the best interests of the child).

The elements stated above must be established by clear and convincing evidence. See Tenn. Code Ann. § 36-1-113(c)(1); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002). The clear and convincing evidence standard is a heightened burden of proof which serves to minimize the risk of erroneous decisions. *In re C.W.W.*, 37 S.W.3d at 474; *Matter of M.W.A., Jr.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). Evidence satisfying this high standard produces a firm belief or conviction regarding the truth of facts sought to be established. *In re C.W.W.*, 37 S.W.3d at 474. The clear and convincing evidence standard defies precise definition. *Majors v. Smith*, 776 S.W.2d 538, 540 (Tenn. Ct. App. 1989). It is more exacting than the preponderance of the evidence standard, *Santosky v. Kramer*, 455 U.S. 745, 766 (1982); *Rentenbach Eng'g Co. v. General Realty Ltd.*, 707 S.W.2d 524, 527 (Tenn. Ct. App. 1985), but not as exacting as the beyond a reasonable doubt standard. *Brandon v. Wright*, 838 S.W.2d 532, 536 (Tenn. Ct. App. 1992); *State v. Groves*, 735 S.W.2d 843, 846 (Tenn. Crim. App. 1987). Clear and convincing evidence eliminates any serious or substantial doubt concerning the correctness of the conclusions to be drawn from the evidence, see *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n. 3 (Tenn. 1992), and it should produce a firm belief or conviction with regard to the truth of the allegations sought to be established. *In re Estate of Armstrong*, 859 S.W.2d 323, 328 (Tenn. Ct. App. 1993); *Brandon*, 838 S.W.2d at 536; *Wiltcher v. Bradley*, 708 S.W.2d 407, 411 (Tenn. Ct. App. 1985).

On appeal, the trial court's findings of fact are reviewed *de novo* upon the record accompanied by a presumption of correctness unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *In re F.R.R.*, 193 S.W.3d at 530. In weighing the preponderance of the evidence, great weight is afforded to the trial court's determinations of witness credibility, which

shall not be reversed absent clear and convincing evidence to the contrary. *See Jones*, 92 S.W.3d at 838.

Questions of law, however, are reviewed *de novo* with no presumption of correctness. *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 744-45 (Tenn. 2002). A trial court's ruling that the facts of the case support a ground of termination, such as the ground of willful abandonment, are examined as questions of law, which are reviewed *de novo* with no presumption of correctness. *In re Adoption of A.M.H.*, 215 S.W.3d 793, 810 (Tenn. 2007); *Cf. In re Valentine*, 79 S.W.3d at 548 (concluding that substantial noncompliance is a question of law which we review *de novo* with no presumption of correctness).

### ANALYSIS

Parental rights are among the oldest of the judicially recognized liberty interests protected by the Due Process Clauses of the federal and state constitutions. *In re S.L.D.*, No. E2005-01330-COA-R3-PT, 2006 WL 1085545 \*2 (Tenn. Ct. App. April 26, 2006) (citing *Troxel v. Granville*, 530 U.S. 57 (2000); *Hawk v. Hawk*, 855 S.W.2d 573, 578-79 (Tenn. 1993); *Ray v. Ray*, 83 S.W.3d 726, 731 (Tenn. Ct. App. 2001)). Parental rights are not, however, absolute. *State v. C.H.K.*, 154 S.W.3d 586, 589 (Tenn. Ct. App. 2004).

Termination proceedings are governed by statute. Tenn. Code Ann. § 36-1-113; *see Osborn v. Marr*, 127 S.W.3d 737, 739 (Tenn. 2004). Termination of parental rights must be based upon a finding by the court that (1) a ground for termination has been established, Tenn. Code Ann. § 36-1-113(c)(1); *In re D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003); *Jones*, 92 S.W.3d at 838; and (2) termination of the parent's rights is in the child's best interests.<sup>2</sup> Tenn. Code Ann. § 36-1-113(c)(2); *In re A.W.*, 114 S.W.3d at 545; *In re M.W.A., Jr.*, 980 S.W.2d at 622.

The Department has an affirmative duty to make "reasonable efforts" to preserve, repair, or restore parent-child relationships whenever reasonably possible." *In re C.M.M.*, No. M2003-01122-COA-R3-PT, 2004 WL 438326 at \*6 (Tenn. Ct. App. Mar. 9, 2004). Reasonable efforts are statutorily defined as the "exercise of reasonable care and diligence by the department to provide services related to meeting the needs of the child and the family." Tenn. Code Ann. § 37-1-166(g)(1).

### Grounds for Termination

The trial court found several grounds for the termination of Father's rights were established by clear and convincing evidence: (1) abandonment by failure to support, (2) abandonment by failure to establish a suitable home, (3) substantial non-compliance with the permanency plan, (4) persistence of conditions, and (5) failure to exercise duties as the child's biological father. The Department, however, has conceded two of the grounds: abandonment by failure to establish a

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<sup>2</sup>The requisite proof must meet one of the higher evidentiary standards, that of clear and convincing evidence. *In re M.W.A., Jr.*, 980 S.W.2d at 622; *State Dep't of Children's Services v. Demarr*, No. M2002-02603-COA-R3-JV, 2003 WL 21946726 at \*9 (Tenn. Ct. App. Aug. 13, 2003).

suitable home, and persistence of conditions.<sup>3</sup> We will therefore limit our analysis to the grounds the Department relies upon on appeal: (1) abandonment by failure to support, (2) substantial non-compliance with the permanency plan, and (3) failure to exercise duties as the child's biological father. Father contends these grounds were not proven by clear and convincing evidence. We will discuss each in turn.

#### ABANDONMENT

A parent abandons his or her child if the parent has “willfully failed to support” or “willfully failed to make reasonable payments toward the support of the child” for a period of four consecutive months immediately preceding the filing of a pleading to terminate the parental rights of the parent. Tenn. Code Ann. § 36-1-102(1)(A)(I). “Willfully failed to support” is statutorily defined as “the willful failure, for a period of four (4) consecutive months, to provide monetary support or the willful failure to provide more than token payments toward the support of the child.” Tenn. Code Ann. § 36-1-102(1)(D). “Token support” is where the “support, under the circumstances of the individual case, is insignificant given the parent’s means.” Tenn. Code Ann. § 36-1-102(1)(B).

A parent’s failure to support is “willful” if (1) the parent is aware of his duty to support, (2) has the capacity to provide the support, (3) makes no attempt to provide support, and (4) has no justifiable excuse for not providing the support. *In re W.J.R.C.*, 152 S.W.3d 513, 524 (quoting *In re Adoption of Muir*, No. M2002-02963-COA-R3-CV, 2003 WL 227944524, at \*5 (Tenn. Ct. App. Nov. 25, 2003)). The element of “willfulness” of a parent’s actions hinges on his intent, which is usually incapable of direct proof. *In re B.P.C.*, No. M2006-02084-COA-R3-PT, 2007 WL 1159199, at \*30 (Tenn. Ct. App. April 18, 2007) (citing *In re Audrey S.*, 182 S.W.3d 838, 864 (Tenn. Ct. App. 2005)). Thus, intent must often be inferred from circumstantial evidence drawn from the parent’s actions or conduct. *In re B.P.C.*, 2007 WL 1159199, at \*30.

Father concedes that he has never provided any form of support, direct or indirect, for his child since her birth. He also concedes that he has been gainfully employed at all relevant times and was employed by Dell Computer Corporation at the time of trial making approximately \$26,000 annually. Nevertheless, Father contends that he has not willfully failed to support his child. His contention is based on the premise that he was never told “how much to pay” and that he wanted to make his support payments via payroll deduction but no one made the necessary arrangements for his employer to withhold child support. He seeks to excuse his failure to support by explaining that he told his caseworker and her supervisor that he was willing to pay support and that he wanted it deducted from his paycheck at Dell. Further, he justifies his failure to provide any support of any kind by explaining that none of the caseworkers did anything but “suggest” that he pay child support, and that they never specified an amount to pay or where to pay the support. We find no merit to Father’s argument for several reasons.

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<sup>3</sup> On page twelve of its brief, the Department states: “Because [the child] never lived in [Father’s] home, failing to establish a suitable home and persistent conditions will not be pursued as grounds for termination [Father’s] parental rights to [the child] on appeal.”

The obligation to pay child support exists regardless of whether there is a court order to provide support. *In re W.J.R.C and S.D.H.*, 152 S.W.3d at 523-24. Therefore, Father was not relieved of his support obligation due to the absence of a court order directing him to pay a specified amount. Moreover, Father was expressly advised of his duty to support his child when he signed the permanency plan in May of 2006, which was more than four months prior to the filing of the petition to terminate his parental rights. In fact, the plan expressly required that he provide support. Although Father had the legal and contractual duty to provide financial support to or for the benefit of his child, he failed to provide any financial support for his child in the four months preceding the filing of the petition to terminate.

Father does not dispute that he had the financial ability to pay child support at all times material to this action. Indeed, the record shows that Father was gainfully employed during the relevant period and had been employed by Dell Computer since August of 2005, receiving an annual income from \$24,000 to \$26,000.<sup>4</sup> Based upon the foregoing evidence, the record clearly and convincingly proves that Father had the ability to provide financial support to or for the benefit of the child during the four months at issue.

Although the record clearly and convincingly proves that Father had the ability to provide financial support during the four months at issue, it is undisputed that he failed to provide any support, direct or indirect. During the trial, Father attempted to justify his failure to provide support. The inadequacy of his explanation is revealed by his testimony, which reads in pertinent part:

Q. Did you ever try to give [the foster parents] some money? Say, buy [the child] a dress. Buy her diapers, or –

A. No. Because when it's ours, it would be – I got my kids, and I love to take my kids to the store and do things with them. And if I had to buy clothes, I'll take them to Wal-Mart. I can't afford any more, but – and that's my desires, and *being in foster care I believe my baby's being taken care good. I don't see her suffer from hunger or something like that.* You know, say this is required and needs to pay this, but, I mean, my way it would be that – yes, I want to feel free to go with my kids to the store, to McDonald's, but I wasn't able.

....

Q. You didn't think it would be a good idea to help [the foster parents] out by giving them some money? You knew they were buying her necessities, didn't you?

A. Well, like I say, that's my desires about my kids, about my life, not that I deal with stuff and thinking in other ways like you ask me about paying child support. *I knew there would be a day of some kind of money that needs to pay.* When I first went into this case, that comes into my mind that if I want to work this case, I have to be responsible for what is there. I'm talking about bills to take care of [the child].

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<sup>4</sup> At the time of trial he was making approximately \$26,000 annually.

That's – that's before I worked. That is why you still see me in this case, and set in my mind and say this is what I'm going to do.

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Q. But you know – you said one of the first things that came to your mind was the child support, correct?

A. I believe that comes to my mind, but when I talked to Angie, she told me that you had to pay. Never say, You have to pay.

Q. Have you been putting money aside for that day when someone says you owe?

A. *I always say there can be ways they can take it out of my check. I work – I've been working, so.* (emphasis added).

Father's testimony reveals that he was fully aware of his duty to provide support, that he was able to provide support, and yet he made no attempt to do so.

Father additionally attempts to justify his failure to provide support by insisting that no one set up an order requiring Dell to withhold support or to tell him how much to pay and to whom. As with his other explanations, this one also falls short of the mark. He used the excuse that he did not know how to go about paying child support yet the record reveals he found his way through the legal system to get his visitation increased. He did this by going to court and asking for an increase in visitation yet, while he was there, he elected not to address his duty to pay child support.

As further evidence of the willfulness of Father's failure to pay support is the fact that Father was informed by the Department and his attorney that he could go to the Office of the District Attorney to make arrangements to pay child support. In spite of this express and simple guidance, Father never attempted to contact the Office of the District Attorney in an effort to provide financial support for his child.

For the foregoing reasons, we find the record contains clear and convincing evidence that Father willfully failed to financially support his child during the four months preceding the filing of the termination of parental rights petition. We therefore affirm the trial court's finding and conclusion that Father abandoned the child pursuant to Tenn. Code Ann. § 36-1-113(g)(1) by failing to provide financial support.

#### ADDITIONAL GROUNDS

One's parental rights may be terminated based upon a finding by the court that one statutory ground for termination has been established, Tenn. Code Ann. § 36-1-113(c)(1); *In re D.L.B.*, 118 S.W.3d at 367; *Jones*, 92 S.W.3d at 838, and that termination of the parent's rights is in the child's best interests. Tenn. Code Ann. § 36-1-113(c)(2); *In re A.W.*, 114 S.W.3d at 545; *In re M.W.A., Jr.*, 980 S.W.2d at 622. Only one ground need be proven and we have affirmed the termination of Father's rights on the ground of abandonment; thus, whether we affirm or reverse one or both of the

other two grounds is now immaterial. Nevertheless, for judicial economy we will voluntarily address the other grounds upon which the Department relies to justify termination of Father's parental rights.

#### SUBSTANTIAL NON-COMPLIANCE

The trial court found that Father had not substantially complied with his obligations as set forth in the permanency plan. Specifically, the trial court found Father was "in substantial non-compliance with the Permanency Plan in that he has failed to pay any support, has failed to attend Anger Management, and has failed to obtain adequate housing."

Of the nine requirements of Father under the permanency plan, Father had not complied with four of them. More significantly, the requirements he failed to accomplish were some of the more significant ones, including that he attend anger management, pay support for the child, obtain medical insurance for the child, and identify an appropriate supervision plan for the child. Although Father failed, as the court found, to substantially comply with these important goals, the record indicates that he received little assistance from the Department to accomplish these goals.

Although the parent has affirmative duties, permanency plans place a corresponding duty on the Department to assist the parent in reaching the agreed upon goals. *In re Tiffany B.*, 228 S.W.3d 148, 158 (Tenn. Ct. App. 2007) (perm. app. denied May 29, 2007). The Department's efforts to assist parents need not be "herculean"; nevertheless, the Department must do more than simply "provide the parents with a list of service providers and then leave the parents to obtain services on their own." *Id.* (citing *In re Giorgianna H.*, 205 S.W.3d 508, 519 (Tenn. Ct. App. 2006)).

The record in this case provides surprisingly little detail concerning efforts made by the Department to assist Father in meeting the goals of his permanency plan. The trial court made a general finding that the Department had upheld its duty; however, it did not make specific findings of fact as to the efforts of the Department to assist Father. Moreover, our search through the voluminous record has failed to reveal any meaningful efforts made by the Department. To the contrary, Father was not given assistance in finding and attending an anger management class. Moreover, and significantly, when Father informed his case managers, and there were three, that he had previously completed an anger management course and had a certificate of completion to prove it, none of them advised him that it would not be accepted. In fact, the evidence in the record clearly indicates that the Department had already decided that the child had been in foster care long enough before Father was brought in to the case. Admittedly, it was most unfortunate that almost a year had passed, however, that delay was due to the mother's misrepresentations as to the identity of the true father and her failure to inform the Department of Father's identity until January of 2006. But for assisting Father in obtaining a DNA test in March of 2006, the record reveals little effort by the Department to provide him with meaningful assistance to successfully accomplish the goals of the permanency plan.

We, therefore, conclude that the record does not contain clear and convincing evidence that the Department exerted reasonable efforts to assist Father. Accordingly, we reverse the trial court's



ruling that Father's parental rights should be terminated on the grounds of substantial non-compliance with the permanency plan.

#### FAILURE TO ESTABLISH PARENTAGE

The trial court found that Father's parental rights should be terminated based upon his "failure to establish parentage," pursuant to Tenn. Code Ann. § 36-1-113(g)(9)(A)(vi). In order to terminate a father's parental rights on this ground, the statute requires a showing that "the person has failed to file a petition to establish paternity of the child within thirty days after notice of alleged paternity by the child's mother, or as required in § 36-2-318(j), or after making a claim of paternity pursuant to § 36-1-117(c)(3)." It is undisputed that Father never filed a petition to establish paternity; however, we find the statute inapplicable based on the unique facts of this case.

The statute, Tenn. Code Ann. § 36-1-113(g)(9)(A)(vi), has three alternative components, any one of which may activate the running of the thirty day requirement to establish parentage. The only one that could be relevant to this issue is the duty of a man to establish parentage after receiving "notice" as defined by Tenn. Code Ann. § 36-1-113(g)(9)(A)(vi) of paternity by the child's mother.<sup>5</sup> There is substantial and credible evidence in the record that the child's mother engaged in a protracted period of deceit, from conception until the child was ten months old, by repeatedly stating that Mr. Chavez, the man with whom she was residing, was the child's father. Although Father maintained a relationship with the mother during her pregnancy, the mother continued to tell him that Mr. Chavez was the father and he was more than justified to rely upon her representations because she was living with Mr. Chavez.

Significantly, when the Department became involved, the mother identified Mr. Chavez as the father and she continued to do so until the Department confronted her with the fact that Mr. Chavez was not the father. By this time the child was ten months old and had been in foster care for eight months. It was not until January of 2006, when she was confronted with the fact that Mr. Chavez could not be the father, that the mother ever mentioned to the Department that she had sexual relations with Father at the time of conception and that he may be the father.

Although the mother never directly notified Father of the fact that he was or may be the father, in February of 2006 Father learned that caseworkers at the Department wanted to speak with him because they had been informed by the mother that he may be the child's father. When Father learned of this, he voluntarily traveled to the office of the Department to meet with the case worker. Once the Department explained the facts to him, Father immediately stated to the caseworker that if he was the biological father that he wanted to assume his parental responsibilities. The Department

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<sup>5</sup>The statute specifies that notice may be provided by the mother to the father in writing or orally. Tenn. Code Ann. § 36-1-113(g)(9)(A)(vi)(B)(i) defines "notice" to mean "the mailing . . . or the sending by . . . other conveyance, to the person charged with notice at such person's address a statement that such person is believed to be the biological parent of a child." Tenn. Code Ann. § 36-1-113(g)(9)(A)(vi)(B)(ii) provides: "Notice" also means the oral statement to an alleged biological father from a biological mother that the alleged biological father is believed to be the biological father of the biological mother's child." The evidence in this case is wholly inadequate to establish that either form of notice was provided by the mother to Father.

made arrangements for him to have a DNA test, which he agreed to do. When it was established that he was the biological father, Father promptly entered into an agreed permanency plan in June of 2006, a stated goal of which was to unite father and child. An essential, though unstated, component of the goal of reunification would have been the recognition of Father's parentage and his corresponding parental responsibilities. Thus, his parentage would have been established in this action prior to the case being closed.<sup>6</sup> We also find it significant that the Department not only failed to make the establishment of his parentage a stated goal of the Permanency Plan, the Department led him to believe that it was not necessary by identifying his relationship with the child as the "Legal Father" in the Permanency Plan.<sup>7</sup>

Due to the unique facts of this case, we reverse the ruling of the trial court that Father's parental rights should be terminated on the ground that he failed to timely establish parentage pursuant to Tenn. Code Ann. § 36-1-113(g)(9)(A)(vi).

### **THE BEST INTERESTS OF THE CHILD**

Having determined that a statutory ground exists for terminating Father's parental rights, we must now consider whether termination of Father's parental rights is in the child's best interest. *See* Tenn. Code Ann. § 36-1-113(c)(2).

In determining whether the termination is in the child's best interest, the court shall consider, but is not limited to, the following:

- (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
- (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
- (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
- (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
- (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
- (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;

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<sup>6</sup>However, if Father failed to achieve his goal of unification, the alternative goal was to terminate his parental rights in which event establishing his parentage would have been of no consequence.

<sup>7</sup>Father's relationship with the child is identified as the "Legal Father" on page 2 of the June 2, 2006 Permanency Plan.

- (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;
- (8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or
- (9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Tenn. Code Ann. § 36-1-113(I). The foregoing list is not exhaustive and the statute does not require that every factor apply for a court to find that termination is in a child's best interest. *State of Tenn., Dep't of Children's Servs. v. L.H.*, No. M2007-00170-COA-R3-PT, 2007 WL 2471500, at \*7 (Tenn. Ct. App. Aug. 31, 2007) (perm. app. denied Dec. 3, 2007) (citing *In re S.L.A.*, 223 S.W.3d 295, 301 (Tenn. Ct. App. 2006)).

The trial court found that "the proof presented at trial was clear and convincing that the termination of [Father's] parental rights in this case would be in the best interest of the child." Further, the trial court stated that "there can be no doubt that it would be in this child's best interest that the parental rights of her biological parents be terminated so that she may be adopted by her foster parents," and that the foster home has provided the child stability that "would be lacking in any home placement involving the respondent/father." The trial court also found that "the child has established and enjoys a loving, caring relationship with her foster parents, who have had the child since she was approximately seven weeks of age," and that "[a]s was testified to by [the child developmental specialist], to remove the child from the foster parents would have profound traumatic consequences for the child." The record clearly and convincingly supports these findings.

The child has been in a loving and caring foster home for all but a few weeks of her life and the foster parents wish to adopt the child. Conversely, Father has a history of violent behavior and has failed to pay child support. Moreover, Father who has other children, has failed to establish a home of his own for those children.

The best interests of the child are to be determined from the perspective of the child rather than the parent. *See L.H.*, 2007 WL 2471500, at \*7 (citing *White v. Moody*, 171 S.W.3d 187, 194 (Tenn. Ct. App. 2004)). Viewing the evidence from the child's perspective, the record shows clear and convincing evidence that the termination of Father's parental rights is in the child's best interest.

### IN CONCLUSION

The judgment of the trial court is affirmed in part and reversed in part, and this matter is remanded for entry of an order consistent with this opinion. Due to Father's indigency, costs of appeal are assessed against the Department of Children's Services.

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FRANK G. CLEMENT, JR., JUDGE